(13)

No. 88-192

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

MCKESSON CORPORATION,
Petitioner,
v.
DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO,
DEPARTMENT OF BUSINESS REGULATION, and
OFFICE OF THE COMPTROLLER, STATE OF FLORIDA,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

BRIEF FOR THE PETITIONER ON REARGUMENT

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INTRODUCTION

On July 3, 1989, the Court restored this case to the calendar for reargument. The Court directed petitioner McKesson

Corporation ("McKesson") and respondents Division of Alcoholic Beverages and Tobacco, Department of Business Regulation and Office of the Comptroller, State of Florida (collectively, "the State") to brief the following questions:

> 1. When a taxpayer pays under protest a State tax found to violate clearly established law under the Commerce Clause must the State provide some form of retrospective relief, such as a tax refund or an offsetting tax on past beneficiaries of the tax preference, or may the State elect to provide only prospective relief?
>
> 2. May a State, consistently with the Due Process Clause of the 14th Amendment, remedy the effects of a tax found to discriminate against an interstate business in violation of the Dormant Commerce Clause by retroactively raising the taxes of those who benefited from the discrimination?

McKesson respectfully submits this Brief on Reargument to address the Court's questions.[1]

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[1]McKesson's updated Rule 28.1 list is attached to this Brief as Appendix A.

SUMMARY OF ARGUMENT

The Court's first question on reargument asks whether a state whose tax statute violates clearly established law under the Commerce Clause must provide retroactive relief.

The Court in this case need only apply equitable principles, which the Court has affirmed in other cases challenging state taxation, to hold that Florida must provide retroactive relief from its unconstitutional taxation.[2] States may not preserve their unlawful taxation by denying retroactive relief. *See, e.g., Iowa-Des Moines Nat'l Bank* v. *Bennett*, 284 U.S. 239 (1931).

In this case, the Florida Supreme Court's failure to follow this Court's equitable remedial principles underscores the rationale for ordering retroactive relief. The Florida court's decision, which permitted Florida to retain unconstitutional taxes in violation of the Commerce Clause, encouraged the Florida legislature to enact yet another discriminatory tax scheme, the third unconstitutional Florida tax scheme within this decade.

The Florida court was not free to apply this Court's doctrine to hold that Florida violated the Commerce Clause but then ignore this Court's equitable principles concerning a remedy for Florida's violation. The Court has required states to provide retroactive relief from unconstitutional taxation. The Florida court thus may not construct its own prospectivity doctrine to

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[2]The Court in this case does not need to decide whether a state that *has not waived* its sovereign immunity must provide such relief, since Florida *has waived* its sovereign immunity to allow tax refund actions. The Court also does not need to decide whether the Commerce Clause supports an action for damages, since McKesson has not sought damages for Florida's violation of the Commerce Clause.

limit its Commerce Clause holding and to avoid retroactive relief. The Court articulated in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), the prospectivity standard that governs a court's consideration of prospectivity in a case, like this one, concerning the prospective or retroactive operation of federal law.

This Court's *Chevron* standard establishes a threshold test for prospectivity: a court's decision "must establish a new principle of law." 404 U.S. at 106. Where a court's decision has not established any new principle but rather has applied settled principles, a litigant may not legitimately claim justifiable reliance on a former state of the law. Therefore, under the *Chevron* standard, as well as the historic rule that judicial decisions operate retroactively, a court that holds that a tax scheme violates clearly established law under the Commerce Clause must provide retroactive relief.

As the Florida Supreme Court found in this case, Florida's discriminatory Revised Florida Products Exemption, sections 564.06 and 565.12, Florida Statutes (1985), violated clearly established Commerce Clause doctrine. Florida may not claim justifiable reliance on prior law because the Florida Supreme Court's decision did not establish any new principle of law. Thus, the Florida court should not have denied retroactive relief from Florida's unconstitutional discrimination.

The Court's second question on reargument concerns the constitutionality of a retroactive tax as an alternative form of retroactive relief from discriminatory taxation. This Court and numerous other courts have held that a tax that has a limited retroactive reach does not necessarily offend due process because of its retroactivity. *See Welch v. Henry*, 305 U.S. 134,

146-151 (1938). A state that acts promptly to correct discriminatory taxation by retroactively taxing the favored firms – so long as the tax retroactively covers only a brief period – may avoid tax refund liability. Therefore, in some cases, states may utilize retroactive taxation as an alternative to tax refunds where the states' tax schemes are found unconstitutional. However, in this case, retroactive taxation is not an alternative.

First, Florida did not act promptly to remedy its Commerce Clause violation. Florida adamantly avoided correcting its discriminatory taxation, either retroactively or even prospectively. The Florida legislature has not chosen to enact retroactive taxation. Of course, neither this Court nor any Florida court, on its own initiative, may impose a retroactive tax in Florida.

Second, Florida may not now, after resisting equal tax treatment for years, reach back the necessary *five years* to tax retroactively Florida's favored taxpayers. Such expansive, unanticipated retroactivity would resemble confiscation rather than taxation. The Due Process Clause permits only limited retroactivity.

In this case, McKesson submits that a refund of the discriminatory portion of the taxes that McKesson paid remains the only proper, available remedy for Florida's unconstitutional taxation.

ARGUMENT

I. SINCE FLORIDA VIOLATED CLEARLY ESTABLISHED LAW UNDER THE COMMERCE CLAUSE, FLORIDA MUST PROVIDE RETROACTIVE RELIEF

The Court's first question on reargument asks whether a state whose tax statute violates clearly established law under the Commerce Clause must provide retroactive relief.

This Court's decisions establish that a state that collects taxes in violation of federal law must provide retroactive relief from the unlawful taxation. In *Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239, 244, 247 (1931), for example, the Court held that the state had to refund the taxes that it had collected in violation of the Fourteenth Amendment. The Court thereby rejected the state supreme court's remedy, which would have allowed the state to retain the discriminatory taxes, because the state court's remedy failed to vindicate federal rights. *Id.* *See also* Fallon, *The Ideologies of Federal Courts Law*, 74 Va. L. Rev. 1141, 1210 n.314 (1988). Similarly, in *Ward v. Love County*, 253 U.S. 17, 24 (1920), the Court held that federal law, rather than state law, required the county to refund taxes that the county collected by compulsion in violation of federal law. *See also* Hart, *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 525 (1954).

The Court in this case, however, does not have to consider whether a state that *has not waived* its sovereign immunity must provide retroactive relief from unlawful taxation. Florida *has waived* sovereign immunity and has allowed suits "to determine the validity of a tax and to direct the making of a refund." *State*

ex. rel. Victor Chem. Works v. Gay, 74 So.2d 560, 564 (Fla. 1954). Indeed, the Florida Supreme Court has ordered tax refunds in numerous cases in which taxpayers successfully challenged state tax statutes. *See, e.g., Colding v. Herzog*, 467 So.2d 980, 983 (Fla 1985); *City of Tampa v. Thatcher Glass Corp.*, 445 So.2d 578, 580 (Fla. 1984); *Osterndorf v. Turner*, 426 So.2d 539, 545-546 (Fla. 1982); *City of Tampa v. Birdsong Motors, Inc.*, 261 So.2d 1, 7 (Fla. 1972). Historically, the Florida courts have favored taxpayers' expeditious recovery of improper taxes. *State ex rel. Palmer-Florida Corp. v. Green*, 88 So.2d 493, 495 (Fla. 1956). Sovereign immunity simply is not an issue in this case.

This Court's decisions also indicate that the Constitution, in some cases, might support an action for damages where a state has violated the Constitution. *See, e.g., Carlson v. Green*, 446 U.S. 14 (1980); *Davis v. Passman*, 442 U.S. 228 (1979); *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971). A unanimous Court in *Bush v. Lucas*, 462 U.S. 367 (1983), stated: "The federal courts' statutory jurisdiction to decide federal questions confers adequate power to award damages to the victim of a constitutional violation." *Id.* at 378.

The Court in this case, however, does not have to decide whether the Commerce Clause supports a cause of action for damages. McKesson did not prosecute an action for damages for Florida's violation of the Commerce Clause. McKesson's action, therefore, differs from *Carlson*, or *Davis*, or *Bivens*. McKesson, which brought this action under Florida's general tax refund statute, section 215.26, Florida Statutes (1985), seeks to recover that discriminatory portion of McKesson's taxes that Florida collected from McKesson in violation of clearly established federal law.

In this case, the Court can address Florida's unconstitutional tax discrimination through traditional equitable principles that compel Florida to provide retroactive relief.

A. This Court's Decisions Establish That Florida Must Provide Retroactive Relief

This Court's decisions, in a long line of cases, direct states to provide retroactive relief from taxation that violates federal law. The Court, of course, plainly has authority to direct such equitable relief. "The broad power of federal courts to grant equitable relief for constitutional violations has long been established." *Carlson v. Green*, 446 U.S. 14, 42 (1980) (Rehnquist, J., dissenting) (distinguishing between federal courts fashioning equitable remedies for constitutional violations and courts inferring a damages remedy).

First, the Court has established that a state that collects taxes in violation of federal law incurs an obligation to return the unlawful taxes.

In *Ward v. Love County*, 253 U.S. 17, 24 (1920), the Court held that a county had collected certain taxes in violation of the federal Constitution. The Court stated: "[t]o say that the county could collect these unlawful taxes by coercive means and not incur any obligation to pay them back is nothing short of saying that it could take or appropriate the property of these [taxpayers] arbitrarily and without due process of law."

Similarly, in *Carpenter v. Shaw*, 280 U.S. 363, 369 (1930), the Court stated that "a denial by a state court of a recovery of taxes exacted in violation of the laws or Constitution of the

United States by compulsion is itself in contravention of the Fourteenth Amendment." *See also Maryland v. Louisiana*, 452 U.S. 456, 457 (1981) (ordering state whose tax statute violated the Commerce Clause and Supremacy Clause to provide a tax refund).

Second, this Court has established that a taxpayer from whom a state has exacted taxes in violation of federal law should have an effective remedy to recover the taxes.

Justice Holmes, writing for the Court in *Atchison, Topeka & Santa Fe Ry. v. O'Connor*, 223 U.S. 280, 285 (1912), stated:

> [i]t is reasonable that a man who denies the legality of a tax should have a clear and certain remedy. The rule being established that apart from special circumstances he cannot interfere by injunction with the State's collection of its revenues, an action at law to recover back what he has paid is the alternative left.

In *Montana Nat'l Bank of Billings v. Yellowstone County of Mont.*, 276 U.S. 499, 504-05 (1928), the Court observed that the Montana Supreme Court had repudiated its prior construction of discriminatory state tax statutes, but then had denied a refund of the discriminatory taxes. The Court stated that Montana could not deny the taxpayer effective retroactive relief. "[The taxpayer] cannot be deprived of its legal right to recover the amount of the tax unlawfully exacted of it by the later decision which, while repudiating the construction under which the unlawful exaction was made, leaves the monies thus exacted in the public treasury."

Similarly, in *Texas Monthly, Inc. v. Bullock*, ___ U.S. ___, 109 S. Ct. 890 (1989), Justice Brennan's opinion, announcing the judgment of the Court, stated that Texas could not deny a taxpayer the opportunity to pursue effective retroactive relief from unlawful state taxation by *prospectively* curing the violation. "A live controversy persists over Texas Monthly's right to recover the $149,107.74 it paid, plus interest. Texas cannot strip appellant of standing by changing the law after taking its money." *Id.* at 896.[3]

Third, the Court has established that where a state has imposed discriminatory taxation in violation of federal law, the state, not the taxpayer, has the obligation to secure equal treatment.

In *Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239, 247 (1931), the Court declared "well settled" the proposition "that a taxpayer who has been subjected to discriminatory taxation through the favoring of others in violation of federal law, cannot be required himself to assume the burden of seeking an increase of the taxes which the others should have paid." The Court held that the taxpayers against whom the state had discriminated were "entitled to obtain in these suits refund of the excess of taxes exacted from them." *Id.*

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[3]In *Davis v. Michigan Dep't of Treasury*, ___ U.S. ___, 109 S.Ct. 1500 (1989), the Court held that a Michigan tax act violated federal law by favoring retired state and local government employees over retired federal employees. Citing *Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239, 247 (1931), the Court ruled that "to the extent appellant has paid taxes pursuant to this invalid tax scheme, he is entitled to a refund." 109 S.Ct. at 1508-09. The State in *Davis*, unlike the State in this case, conceded that a tax refund was the appropriate remedy. *Id.*

More recently, in *Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster County*, ___ U.S. ___, 109 S.Ct. 633 (1989), the Court held that a taxpayer who had been subjected to discriminatory taxation was entitled to equal treatment. Further, citing *Iowa-Des Moines* and other cases, the Court held that the state may not remit the injured taxpayer to the remedy of seeking to remove the discrimination. The state, itself, must remove the discrimination. *Id.* at 639.

This Court's opinions articulate equitable principles that implicitly recognize that courts must order states to provide retroactive relief from taxation that violates federal law in order to vindicate the federal law. The rationale for this Court's equitable principles applies whether the Court is resolving a challenge to state taxation under federal statutory law,[4] the Equal Protection Clause,[5] the Due Process Clause,[6] the First Amendment,[7] or the Supremacy Clause and Commerce Clause.[8]

Indeed, the Florida courts' consideration of McKesson's constitutional claims underscores the rationale for ordering retroactive relief from state taxation that clearly violates federal law. The Florida Supreme Court denied McKesson any retroactive remedy for Florida's unconstitutional discrimination,

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[4]*See, e.g., Montana Nat'l Bank of Billings v. Yellowstone County of Mont.*, 276 U.S. 499 (1928).

[5]*See, e.g., Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239 (1931).

[6]*See, e.g., Ward v. Love County*, 253 U.S. 17 (1920).

[7]*See, e.g., Texas Monthly, Inc. v. Bullock*, ___ U.S. ___, 109 S. Ct. 890 (1989) (Brennan, J.).

[8]*See, e.g., Maryland v. Louisiana*, 452 U.S. 456 (1981).

permitting Florida to retain, in full, the unlawful taxes. Without fear of liability, the Florida legislature then attempted to deny McKesson even meaningful *prospective* relief. The Florida legislature again enacted a discriminatory tax scheme that violated the Commerce Clause. *See Ivey v. Bacardi Imports, Co., Inc.*, 541 So.2d 1129 (Fla. 1989) (holding that Florida's Revised, Revised Florida Products Exemption also violated the Commerce Clause).

The Florida legislators in this case responded to the parochial pressures that, in fact, confront lawmakers in every state. They enacted protectionist legislation to protect their constituents' interests. As this Court observed in *Nippert v. Richmond*, 327 U.S. 416, 434 (1946), "[p]rovincial interests and local political power are at their maximum weight in bringing about acceptance of this type of legislation." Scholars have observed that "[e]ach state has an economic incentive to impose taxes whose burden will fall, so far as possible, on residents of other states," and states "may also use taxation not to raise revenue but to protect the state's producers or other sellers from the competition of nonresidents." R. Posner, Economic Analysis of Law § 26.3 at 602 (3d ed. 1986).[9]

This Court has held that the Commerce Clause "forbids discrimination, whether forthright or ingenious." *Best & Co. v. Maxwell*, 311 U.S. 454, 455 (1940) (reversing a state court judgment that upheld a challenged tax and denied a tax refund). "The problem," the Court has noted, "comes down therefore to

[9]*See also* L. Tribe, American Constitutional Law § 6-5 at 409, § 6-1 (2d ed. 1988); Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091, 1114-15 (1986); J. Choper, Judicial Review and the National Political Process 205-06 (1980); J. Ely, Democracy and Distrust 83-84 (1980).

whether the state or municipal legislative bodies in framing their taxing measures to reach interstate commerce shall be at pains to do so in a manner which avoids the evils forbidden by the commerce clause." *Nippert v. Richmond*, 327 U.S. 416, 434 (1946).

In this case, the Florida legislature tried to be "ingenious" in evading Commerce Clause constraints. The Florida legislature plainly was not "at pains" to avoid infringing the Commerce Clause. The Florida court's decision, rejecting this Court's remedial principles, thereby undermined the federal constitutional provision that the Florida court purported to uphold. Indeed, to date, Florida's pattern of discrimination in this case provides a paradigm for other states that wish to follow Florida's discriminatory example. Already, state lawmakers are susceptible to pressures to circumvent the Commerce Clause. The courts' failure to provide any effective remedy for statutes that violate the Commerce Clause creates a positive *incentive* to evade the law. Florida's successive discrimination demonstrates that some states will not enact constitutional tax legislation if they may enact unconstitutional tax legislation with impunity.

The Florida court did not have discretion simply to ignore this Court's equitable remedial principles after it applied this Court's Commerce Clause doctrine to strike down Florida's statutes. The Florida court could not ignore this Court's principles concerning a remedy for Florida's violation of federal law any more than it could ignore this Court's Commerce Clause doctrine. In cases challenging state taxation under federal law, such as *Allegheny Pittsburgh, Texas Monthly, Iowa-Des Moines, Montana Nat'l Bank, Carpenter, Ward*, and *Atchison*, this Court did not defer to the state courts to construct the appropriate remedy for the states' violation of federal law. Nor

did the Court permit the state courts to ignore the equitable remedial principles that the Court established to vindicate federal interests.

Indeed, this Court and other federal courts historically have intervened to provide equitable remedies in cases where state courts have not provided an adequate remedy for violations of federal law. *See* Frankfurter, *Distribution of Judicial Power Between United States and State Courts,* 13 Cornell L. Q. 499, 517-18 (1928). In *Allegheny Pittsburgh Coal Co.* v. *County Comm'n of Webster County,* ___ U.S. ___, 109 S.Ct. 633 (1989), for example, the Court held that certain state tax assessments violated the federal Constitution, *and* the Court rejected the adequacy of the state supreme court's proposed remedy. The Court held "that petitioners may not be remitted to the remedy specified by" the state court. *Id.* at 637.

This Court does not merely *advise* state courts concerning remedies for states' violations of federal law, but rather establishes those federal principles by which state courts are bound. *See generally* Hill, *Constitutional Remedies,* 69 Colum. L. Rev. 1109 (1969). *See also* Hart, *The Relations Between State and Federal Law,* 54 Colum. L. Rev. 489, 523 (1954). The Court has refused to "leave to the States the formulation of the authoritative laws, rules, and remedies designed to protect people from infractions by the States of federally guaranteed rights." *Chapman v. California,* 386 U.S. 18, 21 (1967).

The Florida Supreme Court in this case was not free to deny any retroactive relief from Florida's taxation in violation of federal law, permitting Florida to retain the taxes and thereby preserving the unconstitutional discrimination.

B. The Florida Supreme Court Could Not Ignore This Court's Decision In *Chevron* To Avoid Retroactive Relief

The Florida Supreme Court ignored this Court's equitable principles concerning recovery of unlawful taxes. As the court's opinion indicates, the Florida court apparently reasoned that the court could avoid ordering any retroactive relief from Florida's violation of the Commerce Clause by constructing its own prospectivity doctrine to limit its Commerce Clause holding. In applying its own prospectivity doctrine to limit its federal constitutional holding, the Florida court ignored the applicable prospectivity doctrine that the Court constructed in *Chevron Oil Co. v. Huson,* 404 U.S. 97 (1971).

The Florida Supreme Court, under *Great N. Ry. v. Sunburst Oil & Ref. Co.,* 287 U.S. 358 (1932), is free to apply its own prospectivity doctrine in cases challenging state taxation under *state* law. *See Mackey v. United States,* 401 U.S. 667, 698 (1971) (Harlan, J., concurring in part and dissenting in part). However, when the Florida court, as in this case, applies federal constitutional doctrine that this Court has established, the Florida court may not ignore this Court's applicable prospectivity doctrine. "*Sunburst* does not, of course, suggest that [a court] may ignore constitutional interests in deciding whether to attach retrospective effect to a constitutional decision of this Court." *Lemon v. Kurtzman,* 411 U.S. 192, 200 n.2 (1973).

The Court in *Chevron Oil Co. v. Huson,* 404 U.S. 97 (1971), articulated the federal standard that appropriately governs courts' consideration of prospectivity on federal

issues.[10] *Chevron* acknowledges a narrow exception to the historic rule that judicial decisions operate retroactively. *See St. Francis College v. Al-Khazraji*, 481 U.S. 604, 608-609 (1987). The *Chevron* standard, by its terms and by logic, does not direct courts in every case to engage in an analysis of prospectivity and retroactivity before rendering their decision. Rather, under *Chevron*, only where a court's decision establishes a *new principle of law*, should the court determine whether the new principle of law shall operate retroactively or only prospectively. *Chevron*, 404 U.S. at 106. *See also Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 496-99 (1968). Retroactivity is not an open issue in every case.

Thus, *Chevron's* "new principle of law" test serves as the threshold test for prospectivity. *See United States v. Johnson*, 457 U.S. 537, 550 n.12 (1982). *Chevron* directs the court in such a case to consider whether the retroactive operation of the new legal rule "will further or retard its operation." 404 U.S. at 106-07. The court also should "weigh[] the inequity imposed by retroactive application" of the new rule. *Id.* at 107. The *Chevron* standard guides a court in determining whether parties

[10]The American Trucking Associations ("ATA"), petitioners in the consolidated case (No. 88-325), and several amici have argued that the Court should establish a standard for a tax discrimination case that is even more stringent than *Chevron* in limiting prospective-only relief. For example, ATA, citing *Owen v. City of Independence*, 445 U.S. 622 (1980), has argued that a prospectivity doctrine should rarely if ever permit a government to avoid compensating the victim of the government's unconstitutional conduct. *See* Brief for the Petitioners, Case No. 88-325, at 12-13. *See also* Brief of Tax Executives Institute, Inc. at 20-21, Brief of the Committee on State Taxation of the Council of State Chambers of Commerce at 14-16, and Brief of National Private Truck Council, Inc. at 7-17, amici curiae in No. 88-192 and No. 88-325. A state should have no interest in retaining taxes that it has unlawfully collected. *See Moore Ice Cream Co., Inc. v. Rose*, 289 U.S. 373, 378-79 (1933).

may have justifiably relied on a former legal rule and whether, therefore, the new legal rule should operate only prospectively. *See id.* at 108; *Lemon v. Kurtzman*, 411 U.S. 192, 203 (1973); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88 (1982).

When a court has found that a state tax scheme violates clearly established Commerce Clause doctrine, the court may not, consistent with *Chevron* (and the usual rule of retroactivity), deny appropriate retroactive relief. A court whose decision merely applies settled principles of law plainly has not established a new principle of law. The court, therefore, has no cause to engage in a consideration of prospectivity and retroactivity. *See United States v. Johnson*, 457 U.S. 537, 549 (1982).

The Florida Supreme Court in this case, unanimously holding that the discriminatory Florida tax scheme violated the Commerce Clause, applied settled Commerce Clause principles, barring discrimination, that this Court articulated in cases like *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27 (1980), and *Hunt v. Wash. State Apple Advertising Comm'n*, 432 U.S. 333 (1977). (J.A. 416-429)[11] Florida could not claim justifiable reliance on a former state of the law. The Florida Supreme Court, therefore, had no cause to limit the operation of its federal constitutional holding.

[11]In this Brief as in McKesson's initial Brief, citations to "J.A." refer to the Joint Appendix and citations to "M.A." refer to McKesson's Appendix attached to its initial Brief.

II. IN SOME CASES, A STATE THAT ACTS PROMPTLY TO CORRECT DISCRIMINATORY TAXATION MAY USE THE REMEDY OF RETROACTIVE TAXATION

The Court's second question on reargument concerns the constitutionality of a retroactive tax as an alternative form of retroactive relief from discriminatory taxation.

Historically, courts and scholars have condemned tax legislation that reaches back to tax transactions that occurred in the past. *See generally* Note, *Setting Effective Dates for Tax Legislation: A Rule of Prospectivity*, 84 Harv. L. Rev. 436 (1970); Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 Minn. L. Rev. 775 (1936). "Perhaps the most fundamental reason why retroactive legislation is suspect stems from the principle that a person should be able to plan his conduct with reasonable certainty of the legal consequences." Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692, 692 (1960).

Whereas prospective lawmaking is generally associated with legislative action, retroactivity is generally associated with judicial action. *See Mackey v. United States*, 401 U.S. 667, 677-81 (1971) (Harlan, J., concurring in part and dissenting in part); Mishkin, *The Supreme Court 1964 Term – Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 Harv. L. Rev. 56, 59-60, 65-66 (1965). Under the traditional common law distinction, courts declare what the law is and has been, and legislatures declare what the law shall be. "[T]here is the strong common-law tradition that although a court's pronouncements may apply to past conduct, a

legislature's function is to declare law for the future." Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692, 693 (1960).

This Court, however, has generally accepted the legislative judgment that certain limited retroactivity in tax legislation, particularly concerning income taxation, may be not only necessary but also consistent with due process. *See* Hochman, 73 Harv. L. Rev. at 706-07. In 1928, Justice Brandeis observed that "[f]or more than half a century, it has been settled that a law of Congress imposing a tax may be retroactive in its operation." *Untermyer v. Anderson*, 276 U.S. 440, 447 (1928) (Brandeis, J., dissenting). Justice Brandeis noted that various tax acts had applied, retroactively, to income earned during the full calendar year of enactment or, in some cases, to income earned during the previous year. *Id.* at 447-49.

In *United States v. Hudson*, 299 U.S. 498 (1937), the Court upheld a special income tax that operated retroactively for a period of 35 days. The Court found that the brief period of retroactivity was not unreasonable. *Id.* at 501. The Court observed:

> [a]s respects income tax statutes it long has been the practice of Congress to make them retroactive for relatively short periods so as to include profits from transactions consummated while the statute was in process of enactment, or within so much of the calendar year as preceded the enactment; and repeated decisions of this Court have recognized this practice and sustained

it as consistent with the due process of law clause of the Constitution.

Id. at 500.[12]

A year later, in *Welch v. Henry*, 305 U.S. 134 (1938), the Court established a flexible standard to determine whether retroactive taxation violated due process. The Court stated that "a tax is not necessarily unconstitutional because retroactive." *Id.* at 146. "In each case it is necessary to consider the nature of the tax and the circumstances in which it is laid before it can be said that its retroactive application is so harsh and oppressive as to transgress the constitutional limitation." *Id.* at 147.

The Court in *Welch* also firmly established that, consistent with due process constraints, the period of retroactive taxation must be limited. In *Welch*, the taxpayer challenged a 1935 tax statute that imposed a tax on income received in 1933. The taxpayer objected that the retroactive taxation imposed a burden without any advance notice. *Id.* at 148. The Court stated that "[a]ssuming that a tax may attempt to reach events so far in the past as to render that objection valid, we think that no such case is presented here." *Id.*

The Court in *Welch* noted that the Wisconsin legislature had acted promptly to effect its retroactive revision. The legislature

[12]The Court in *Hudson* noted that it applied the Fifth Amendment Due Process Clause in that case. 299 U.S. at 500. In *Heiner v. Donnan*, 285 U.S. 312, 326 (1932), also a challenge to a tax act, the Court stated that "[t]he restraint imposed upon legislation by the due process clauses of the [Fifth and Fourteenth Amendments] is the same." The due process analysis in a retroactive taxation case is the same under either the Fifth Amendment or the Fourteenth Amendment.

enacted its revision of the tax laws applicable to 1933 income at its first opportunity after the returns of 1933 income were filed. *Id.* at 150-51. The Court stated: "we think that the 'recent transactions' to which this Court has declared a tax law may be retroactively applied, *Cooper v. United States*, 280 U.S. 409, 411, must be taken to include the receipt of income during the year of the legislative session preceding that of its enactment." *Id.* at 150. "While the Supreme Court of Wisconsin thought that the present tax might 'approach or reach the limit of permissible retroactivity,' we cannot say that it exceeds it." *Id.* at 151.

The Court recently has reaffirmed its acceptance of limited retroactivity in tax legislation. In *United States v. Darusmont*, 449 U.S. 292 (1981), the Court reviewed a challenge to federal tax provisions enacted in October 1976 but which operated retroactively to cover the entire calendar year 1976. The Court observed that Congress routinely has given tax statutes an effective date prior to the enactment date. *Id.* at 296. "This 'retroactive' application apparently has been confined to short and limited periods required by the practicalities of producing national legislation." *Id.* at 296-97. The Court added: "[t]he Court consistently has held that the application of an income tax statute to the entire calendar year in which enactment took place does not *per se* violate the Due Process Clause of the Fifth Amendment." *Id.* at 297.

In *United States v. Hemme*, 476 U.S. 558 (1986), the Court left open the question of whether a particular gift tax revision constituted retroactive taxation. The Court found that the new tax provision did not cause the taxpayer to pay higher taxes or to suffer any oppressive treatment. *Id.* at 570-71. The Court, however, citing the flexible standard articulated in *Welch*,

reaffirmed "that some retrospective effect is not necessarily fatal to a revenue law." *Id.* at 568-69.

Federal courts of appeals have noted that retroactive tax legislation is not necessarily unconstitutional, but that due process limits the permissible period of retroactivity. For example, in *Westwick v. Commissioner of Internal Revenue*, 636 F.2d 291, 292 (10th Cir. 1980), the Tenth Circuit observed that "[i]t is well settled that an income tax may apply retroactively for limited time periods without violating due process." *See also Shanahan v. United States*, 447 F.2d 1082, 1083-84 (10th Cir. 1971). In *Wheeler v. Commissioner of Internal Revenue*, 143 F.2d 162, 166 (9th Cir. 1944), *rev'd on other grounds*, 324 U.S. 542 (1945), the Ninth Circuit considered the constitutionality of retroactive tax statutes:

> the courts have held that there is a point of time when such retroactivity is beyond the legislative power. The rule that such amendment to legislation must come within the next session of the legislature or within a reasonable length of time as analyzed in [*Welch*] is the sounder law.

Id. at 168.[13]

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[13]In *Canisius College v. United States*, 799 F.2d 18, 23-27 (2d Cir. 1986), *cert. denied*, 481 U.S. 1014 (1987); *Wilgard Realty Co., Inc. v. Commissioner of Internal Revenue*, 127 F.2d 514, 517 (2d Cir. 1942), *cert. denied*, 317 U.S. 655 (1942); *Temple Univ. v. United States*, 769 F.2d 126, 134-35 (3d Cir. 1985), *cert. denied*, 476 U.S. 1182 (1986), the courts also observed that due process limits the permissible retroactivity period. In each of these cases, the courts upheld legislation that reached back more than the usual brief period because the retroactive legislation had merely ratified past practice. *See Canisius College*, 799 F.2d at 26-27; *Wilgard Realty*, 127 F.2d at 517; *Temple Univ.*, 769 F.2d at 135.

Numerous state courts also have determined that due process may permit retroactive taxation but limits the permissible period of retroactivity. For example, the New York Court of Appeals in *Replan Dev., Inc. v. Department of Hous. Preservation and Dev.*, 70 N.Y.2d 451, 517 N.E.2d 200, 202 (1987), *appeal dismissed*, ____ U.S. ____, 108 S. Ct. 1207 (1988), observed that "[r]etroactivity provisions in tax statutes, if for a short period, are generally valid." The court, which found that the challenged tax provision's one-year retroactivity period was not excessive, also observed –

> the length of the retroactive period often has been a crucial factor, and excessive periods have been held to unconstitutionally deprive taxpayers of a reasonable expectation that they "will secure repose from the taxation of transactions which have, in all probability, been long forgotten" [citations omitted].

Id. at 203.[14]

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[14]*See also Lacidem Realty Corp. v. Graves*, 288 N.Y. 354, 43 N.E.2d 440, 441 (1942); *People v. Graves*, 280 N.Y. 405, 21 N.E.2d 371, 372 (1939); *Gunther v. Dubno*, 195 Conn. 284, 487 A.2d 1080, 1091 (1985); *General Tel. Co. of Ill. v. Johnson*, 103 Ill.2d 363, 469 N.E.2d 1067, 1075-76 (1984); *Keniston v. Bd. of Assessors of Boston*, 380 Mass. 888, 407 N.E.2d 1275, 1285 (1980); *Merchants Nat'l Bank of Boston v. Merchants Nat'l Bank of Boston*, 318 Mass. 563, 62 N.E.2d 831, 837 (1945); *Washington Nat'l Arena Ltd. Partnership v. Treasurer, Prince George's County*, 287 Md. 38, 410 A. 2d 1060, 1064, 1069 (1980), *cert. denied*, 449 U.S. 834 (1980); *Comptroller of the Treasury v. Glenn L. Martin Co.*, 216 Md. 235, 140 A.2d 288, 293-300 (1958), *cert. denied*, 358 U.S. 820 (1958); *Klebanow v. Glaser*, 80 N.J. 367, 403 A.2d 897, 900-902 (1979); *Philadelphia Life Ins. Co. v. Commonwealth of Pa.*, 454 Pa. 157, 309 A.2d 811, 814 (1973); *Commonwealth v. Budd Co.*, 379 Pa. 159, 108 A.2d 563, 568-569 (1954), *appeal dismissed*, 349 U.S. 935 (1955); *Colonial Pipeline Co. v. Commonwealth of Va.*, 206 Va. 517, 145 S.E.2d 227, 231 (1965), *appeal dismissed*, 384 U.S. 268 (1966).

In light of this Court's decisions concerning retroactive taxation, a state that acts promptly may, under the Due Process Clause, remedy the effects of a discriminatory tax scheme by retroactively causing the favored local commerce to share equally the tax burden with disfavored interstate commerce. Although the Court's decisions do not establish a firm temporal boundary for permissible retroactivity, this Court's consideration of due process challenges indicates that a statute may reach back to tax transactions that occurred during the full calendar year of enactment or during the preceding year. In some cases, particularly when the affected parties had reason to anticipate revision, a tax may reach back two years, unless otherwise harsh and oppressive. *See Welch v. Henry*, 305 U.S. 134 (1938).

This Court has allowed state courts to choose among alternative remedies in *prospectively* curing certain discrimination. *See, e.g., Davis v. Michigan Dep't of Treasury*, ___ U.S. ___, 109 S.Ct. 1500, 1509 (1989). The Court should extend similar deference to states in *retroactively* remedying the effects of discrimination. In this case as in other cases challenging discriminatory taxation, "[t]he right invoked is that to equal treatment." *Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239, 247 (1931). In this case as in the *Iowa-Des Moines* case,

> [t]he petitioners' rights were violated, and the causes of action arose, when taxes at the lower rate were collected from their competitors. It may be assumed that all ground for a claim for refund would have fallen if the State, *promptly upon discovery of the discrimination*, had removed it by collecting the additional taxes from the favored competitors.

Id. (emphasis added).

Thus, where a state acts promptly upon discovery of the discrimination, the state may have alternative options for remedying the discrimination. A state that wants to avoid any refund liability for unconstitutional taxation may promptly end the discrimination and retroactively equalize the tax burden. If, in that case, the state's tax scheme ultimately is held constitutional, the state may, if it chooses, retroactively restore the permissible preference. On the other hand, a state may reject any retroactive taxation and continue to enforce the suspect tax scheme. If, in that case, the state's tax scheme is held unconstitutional, the state may have lost the option of retroactive taxation through the passage of time and may have to provide an appropriate refund to the disfavored taxpayer. Thus, a state that is prepared to act promptly may choose a constitutional remedy that is consistent with its policies.

III. IN THIS CASE, FLORIDA MAY NOT USE RETROACTIVE TAXATION TO REMEDY FLORIDA'S PERSISTENT VIOLATION OF THE COMMERCE CLAUSE

A. Florida Has Not Chosen To Tax Retroactively The Favored Local Commerce

Arguably, Florida, at one time, could have remedied its discrimination by retroactively taxing the favored local firms. Florida choose not to do so.

During the course of this litigation, the Florida legislature has never acted to tax retroactively the favored local firms. Florida did not act after McKesson in 1986 filed this action, after the Florida circuit court in 1987 found Florida's discrimination unconstitutional, or after the Florida Supreme Court in 1988 ultimately struck down Florida's discriminatory scheme. Moreover, in 1988, when the Florida legislature once again enacted a discriminatory alcoholic beverage tax scheme, which the Florida Supreme Court once again struck down as "clearly discriminatory,"[15] the legislature eschewed any retroactive taxation. In the new act, the Revised, Revised Florida Products Exemption, the legislature added a "savings clause" that, if the new discrimination were held unconstitutional, would equalize the tax burden – prospectively but not retroactively. (M.A. 17a-22a)

As the Florida legislature apparently has rejected retroactive taxation, this Court, of course, may not require Florida to tax retroactively the favored Florida firms. *Davis v. Michigan Dep't of Treasury*, ___ U.S. ___, 109 S.Ct. 1500, 1509 (1989) (citing *Moses Lake Homes, Inc. v. Grant County*, 365 U.S. 744, 752 (1961) ("Federal courts may not assess or levy taxes")).

Similarly, the Florida courts may not order retroactive taxation as a remedy in this case. Florida allows the collection of taxes only by an explicit legislative statute, not by judicial decree. *Belcher Oil Co. v. Dade County*, 271 So.2d 118, 122 (Fla. 1972); *Maas Bros., Inc. v. Dickinson*, 195 So.2d 193, 197-98 (Fla. 1967); *Overstreet v. Ty-Tan, Inc.*, 48 So.2d 158,

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[15] *Ivey v. Bacardi Imports, Co., Inc.*, 541 So.2d 1129, 1140 (Fla. 1989).

160 (Fla. 1950); *State ex rel. Seaboard Air Line R. v. Gay*, 160 Fla. 445, 35 So.2d 403, 409 (1948); *State ex rel. Dos Amigos, Inc. v. Lehman*, 100 Fla. 1313, 131 So. 533, 539 (1930). "[The power to tax] is reposed solely in the legislature. A tax sought to be imposed without legislative authority is a nullity." *Department of Revenue v. Young Am. Builders*, 358 So.2d 1096, 1100 (Fla. Dist. Ct. App. 1978), *aff'd*, 376 So.2d 849 (Fla. 1979).

Further, this Court has held that a state may not require an aggrieved taxpayer, like McKesson in this case, to seek to increase the favored firms' taxes, or to wait for the state to do so.

> [I]t is well settled that a taxpayer who has been subjected to discriminatory taxation through the favoring of others in violation of federal law, cannot be required himself to assume the burden of seeking an increase of the taxes which the others should have paid . . . . Nor may he be remitted to the necessity of awaiting such action by the state officials upon their own initiative.

Iowa-Des Moines Nat'l Bank v. Bennett, 284 U.S. 239, 247 (1931) (citations omitted). *See also Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster County*, ___ U.S. ___, 109 S.Ct. 633, 637, 639 (1989).

B. Under The Due Process Clause, Florida Cannot Now Choose To Tax Retroactively The Favored Local Commerce

Florida did not act promptly to end its unconstitutional discrimination against interstate commerce and to equalize retroactively the tax burden. Further, tenaciously resisting equal taxation, Florida did not acknowledge any tax refund liability for its unconstitutional discrimination. Rather, Florida has adopted its untenable prospectivity theory in order to allow Florida to deny any retroactive relief from its unconstitutional taxation. If the Florida legislature, reversing its course, were to act now at its next session in 1990 to impose a remedial retroactive tax, the retroactive statute would have to reach back and tax transactions that occurred *five years* ago.[16]

The Florida legislature's equalizing, retroactively, the taxes on interstate and local products would violate due process. When so much time has elapsed, such legislative action would be tantamount to confiscation, rather than taxation. Such a tax, which "attempt[s] to reach events so far in the past," would be harsh, oppressive, and unconstitutional. *Welch v. Henry*, 305 U.S. 134, 147-48 (1938). *See generally* Novick & Petersberger, *Retroactivity in Federal Taxation*, 37 Taxes 407, 420 (1959); Note, *Retroactive Excise Taxation*, 37 Harv. L. Rev. 691 (1924). A five-year retroactivity period is far more offensive than the two-year retroactivity period in *Welch*, which presumably "'approach[ed] or reach[ed] the limit of permissible

[16]The Revised Florida Products Exemption, which McKesson challenged in this action, became effective on July 1, 1985. The earliest the Florida legislature could consider legislation to impose a remedial retroactive tax would be during its next regular legislative session, which begins in April 1990. Fla. Const. art. III, § 3(b).

retroactivity.'" *Welch v. Henry*, 305 U.S. 134, 151 (1938). A five-year retroactivity period obviously would exceed the "short and limited periods" acknowledged in *United States v. Darusmont*, 449 U.S. 292, 296-97 (1981), and the 35-day period the Court found "not unreasonable" in *United States v. Hudson*, 299 U.S. 498, 501 (1937).[17]

Moreover, Florida's favored taxpayers have had no reason to anticipate retroactive taxation as a remedy in this case. "One of the relevant circumstances is whether, without notice, a statute gives a different and more oppressive legal effect to conduct undertaken before enactment of the statute." *United States v. Hemme*, 476 U.S. 558, 569 (1986). *Cf. United States v. Darusmont*, 449 U.S. 292, 299 (1981). Where parties have no reason to anticipate a retroactive tax burden on transactions that occurred years ago, they undoubtedly determine their conduct accordingly.[18] For example, companies necessarily make sales commitments, pricing decisions, investment

[17]*See also General Tel. Co. of Ill. v. Johnson*, 103 Ill.2d 363, 469 N.E.2d 1067, 1075-76 (1984) (holding that the constitutionality of an unexpected change in tax liability after 3-1/2 years "indeed would be questionable"); *Keniston v. Board of Assessors of Boston*, 380 Mass. 888, 407 N.E.2d 1275, 1285 (1980) (holding that a 3-year retroactivity period violated due process); *Comptroller of the Treasury v. Glenn L. Martin Co.*, 216 Md. 235, 140 A.2d 288, 300 (1958) (holding that a 3 to 6 year retroactivity period violated due process), *cert. denied*, 358 U.S. 820 (1958); *Commonwealth v. Budd Co.*, 379 Pa. 159, 108 A.2d 563, 569 (1954) (applying *Welch* and holding that a tax retroactively applied "beyond the year of the general legislative session immediately preceding that of its enactment" would violate due process), *appeal dismissed*, 349 U.S. 935 (1955); *Lacidem Realty Corp. v. Graves*, 288 N.Y. 354, 43 N.E.2d 440, 441 (1942) (holding 4-year retroactivity period violated due process).

[18]The favored firms could hardly anticipate that Florida might later retroactively tax their sales that occurred five years ago. Florida law requires alcoholic beverage manufacturers and distributors to retain sales records for only three years. Fla. Stat. § 561.55, (1987).

decisions, and corporate decisions (such as declaring and paying dividends) in light of anticipated tax treatment. *See* Novick & Petersberger, *Retroactivity in Federal Taxation*, 37 Taxes 407, 420 (1959).

In this case, the Florida legislature's adoption of retroactive taxation would contradict Florida's historic legislative policies.

First, Florida's taxpayers have understood that Florida's remedy for unlawful taxation is a tax refund. *See, e.g., Osterndorf v. Turner*, 426 So.2d 539 (Fla. 1982); *State ex rel. Victor Chem. Works v. Gay*, 74 So.2d 560 (Fla. 1954). The State has acknowledged this remedy. In recommending that the Governor veto the discriminatory tax scheme challenged in this case, the Florida Department of Business Regulation, a respondent in this litigation, noted that the tax scheme would leave Florida vulnerable to tax refund actions. (J.A. 158-65) Indeed, the State, in this litigation, specifically argued that Florida law provides for tax refunds. (J.A. 286) When McKesson asked the Florida circuit court to implement its preliminary injunction against the discriminatory tax scheme, pending the State's appeal, the court considered (but later rejected) placing certain taxes in escrow. *Id.* Florida Assistant Attorney General Brown, objecting to any escrow, stated that Florida's refund statute would be available for the recovery of taxes. The Assistant Attorney General acknowledged the "statutory mechanism in place, Section 215.26, allowing for refunds" to taxpayers. *Id.*

Second, as Florida's favored firms have understood, Florida for many years has followed a policy of favoring local commerce.

Before this Court's decision in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), Florida's alcoholic beverage tax scheme, the Florida Products Exemption, discriminated against interstate commerce. *National Distrib. Co., Inc. v. Office of the Comptroller*, 523 So.2d 156 (Fla. 1988). The Florida Products Exemption specifically favored Florida products. (M.A. 3a-6a)

After the *Bacchus* decision, Florida again rejected equal taxation and enacted the Revised Florida Products Exemption that McKesson challenged in this case. In explaining the purpose of the revised statutes, one sponsor of the new legislation stated:

> I hope that today we will continue to express our hope that Florida products will be used in the manufacture of these products, and that they will be sold here and throughout the country . . . . I want to make it very clear that, since I'm not an expert in this area, my entire purpose and intent is simply to retain what we have done for the last twenty years.

(J.A. 84) In testifying before another legislative committee, the sponsor stated that "[w]ith the language that we have here, we are tying to preserve this Florida industry, leaving access to interstate commerce but limiting it in such a way that our industry benefits." (J.A. 108-09) The Revised Florida Products Exemption continued the original tax scheme's protectionist effect. The revised law simply removed the word "Florida" from the provisions granting favored treatment and substituted specific Florida agricultural products. (M.A. 7a-16a)

After the Florida circuit court held that the Revised Florida Products Exemption unconstitutionally discriminated against

interstate commerce, the State refused to end the discrimination. The State's notice of appeal automatically caused a stay of the circuit court's preliminary injunction under Florida's procedural rules. The State refused to join in McKesson's motion to implement the circuit court's preliminary injunction against the discrimination pending the State's appeal by lifting the automatic stay. (J.A. 272-90) The court thereupon denied McKesson's motion and the discrimination continued.

Even after the Florida Supreme Court in 1988 held that Florida's tax scheme discriminated against interstate commerce, Florida still refused to end the discrimination. Instead, the legislature immediately enacted yet another tax scheme that violated the Commerce Clause. *Ivey v. Bacardi Imports, Co., Inc.*, 541 So.2d 1129 (Fla. 1989). The sponsor of the Revised, Revised Florida Products Exemption, who also sponsored the Revised Florida Products Exemption, explained to the legislature that "[o]ur whole-hearted effort here is to protect something that's been in Florida for some 27 years." (M.A. 46a)

For years, through successive enactments of discriminatory legislation, Florida's favored taxpayers have watched the Florida legislature protect local industry. The favored local firms, which have benefited from Florida's resistance to equal taxation, could not anticipate that Florida would reverse course 180 degrees and impose a substantial *retroactive* tax burden on their past sales.

Florida's taxpayers have had no reason to expect that Florida would not permit a tax refund as the remedy, but would – five years later – engage in retroactive taxation. At this date, Florida's engaging in retroactive taxation to remedy its unconstitutional discrimination would violate due process.

CONCLUSION

McKesson respectfully prays that this Court reverse the Florida Supreme Court's final decree with respect to its denial of retroactive relief. In this case, where retroactive taxation is not available, a tax refund is the only appropriate remedy.

Specifically, McKesson is entitled to the difference between what McKesson actually paid in taxes for its disfavored products under the unconstitutional Revised Florida Products Exemption and what McKesson would have paid in taxes under the rates that the State actually set for the favored products.

Dated: August 11, 1989

Respectfully submitted,

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Petitioner McKesson Corporation's Revised
Rule 28.1 List of Parent Companies, Subsidiaries
(Except Wholly-Owned Subsidiaries) and Affiliates

Armor All Products Corporation
Armor All Products of Canada, Inc.
Armor All Products GmbH
APC Chemicals Inc.
City Properties, S.A.
Comercial Farmaceutica Interamericana, S.A.
Comercial Interamericana, S.A. (Dom. Rep.)
Comercial Interamericana, S.A. (El Salvador)
Comercial Interamericana, S.A. (Guatemala)
Corporacion Bonima, S.A.
Corporacion Interamericana, S.A.
Distribuidores Especialdades, S.A.
Distribuidora Farmaceutica Calox Colombiana, S.A.
Health Data Services, Inc.
Intercal, Inc.
International Health Services, Ltd.
Investigaciones Farmoquimicas De Colombia, S.A.
Laboratorios Calox, C.A.
Medilog Corporation
Medilog GmbH
Organizacion Farmaceutica Americana, S.A.
PCS, Inc.
PCS of New York, Inc.
PCS Services, Inc.
Pharmaceutical Card System Canada, Inc.
Pharmaceutical Data Services, Inc.
SDC Distributing Corp.
Sunbelt Beverage Corporation